



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Marc Industries  
**File:** B-246528; B-246529; B-246530  
**Date:** March 10, 1992

Nancy Holton for the protester.  
James L. Weiner, Esq., Department of the Interior, for the agency.  
Stephen J. Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Agency reasonably determined that firm was substantially controlled by a government employee, and therefore ineligible for contract award, where government employee represented the firm in prework conferences under prior contracts with the agency, served as the contact for any complaints about contract performance and, based on his involvement with the firm, was disciplined for violating his employing agency's conflict of interest regulations.

2. Agency was not required to establish the existence of an actual conflict of interest to preclude an offeror from competing, where it had a reasonable, factual basis for concluding there was a likelihood an actual conflict existed.

### DECISION

Marc Industries protests the rejection of its proposals under request for proposals (RFP) Nos. F-950-RFP-20005, F-950-RFP-20004, and F-950-RFP-20003, issued by the Bureau of Land Management (BLM), Department of the Interior, for janitorial services at BLM facilities at Red Rock Canyon, Tonopah, and Las Vegas, Nevada, respectively. Marc contends the agency improperly found it ineligible for the awards due to a conflict of interest.

We deny the protests.

The solicitations provided for janitorial services contracts to replace similar expiring contracts being performed by Marc, the incumbent, at the same BLM facilities. Although Marc was the apparent low offeror under each of the solicitations, BLM determined that Marc was ineligible for

award pursuant to Federal Acquisition Regulation (FAR) § 3.601 which, among other things, precludes award to a firm substantially controlled by a government employee. BLM's determination was based on information accumulated in connection with Marc's performance under the prior BLM contracts, which indicated that the person identified as the sole owner of Marc, Nancy Holton, was married to Raul Elvins, a government employee who apparently had substantial control of the business.

In October 1990, shortly after awarding the prior contracts to Marc, BLM received a letter from Lt. Col. Michael Button, Chief, Contracting Division, Nellis Air Force Base, Nevada, in connection with an Air Force investigation of one of its employees. Col. Button stated the Air Force had reason to believe that Master Sergeant Raul Elvins ("A.K.A. Raul Garcia, Raul Jesus Ochoa, and Raul Ray Elvyns"), who was serving on active duty as a warranted contracting officer in his division (where he was scheduled to continue serving until September 1992), apparently either owned or substantially controlled Marc. Col. Button requested any information that BLM could provide concerning its contracts with Marc, and any involvement by Mr. Elvins in the company's affairs.

In order to respond to the Air Force, BLM made inquiries of the contracting officials who had been dealing with Marc under the BLM contracts. As a result, BLM was advised that Mr. Elvins had represented the firm in its dealings with BLM, signed for the firm on Notices to Proceed, and generally appeared to be in substantial control of the company. BLM provided this information to the Air Force, which in turn reported to BLM in February 1991 that disciplinary action had been taken against Mr. Elvins for the appearance of a conflict of interest in connection with his involvement with Marc. Based on this and similar information, BLM determined that Marc was ineligible for award and proceeded with the procurements accordingly.<sup>1</sup> Marc's protests followed.

Marc asserts that BLM lacked a proper basis for finding a conflict of interest. According to the protester, the

---

<sup>1</sup>On October 30, 1991, BLM awarded the Tonopah and Las Vegas contracts to the next low offerors, and determined it was in the government's best interest not to suspend performance notwithstanding Marc's timely protests of the contract awards, under FAR § 33.104(c) and 4 C.F.R. § 21.4(b) (1991). For Red Rock Canyon, where Marc was the only offeror, BLM resolicited the requirement, but has advised us it will make no award under the new solicitation pending our decision in this case.

relationship on which the agency's decision apparently was based--the marriage of Ms. Holton and Mr. Elvins--has been terminated by divorce. Marc also states that Mr. Elvins is no longer employed by the firm. The protester concedes that Mr. Elvins represented the company in connection with the BLM contracts, but insists that any other employee could have attended these conferences, and that Mr. Elvins' presence did not indicate substantial control. Marc further asserts there could be no conflict of interest based on Mr. Elvins' government employment because he was employed by the Air Force, not the contracting agency.

Under FAR § 3.601, a contract may not be awarded to a business substantially owned or controlled by a government employee except where, pursuant to FAR § 3.602, an agency official not below the head of the contracting activity finds there is a "most compelling reason" to make an award to that offeror.<sup>2</sup> See Friends of the Waterfront, Inc., 66 Comp. Gen. 190 (1987), 87-1 CPD ¶ 16. FAR § 3.603(a)(1) precludes award to a firm without first obtaining authorization under FAR § 3.602 if the contracting officer knows, or has "reason to believe," that a prospective contractor is one to which award is otherwise prohibited under FAR § 3.601. This prohibition represents longstanding governmental policy intended to avoid the appearance, much less the fact, of favoritism or preferential treatment. Revet Env't & Analytical Labs., Inc., B-221002.2; B-221003.3, July 24, 1986, 86-2 CPD ¶ 102; Defense Forecasts, Inc., 65 Comp. Gen. 87 (1985), 85-2 CPD ¶ 629.

Marc, as indicated above, argues that, despite appearances, Mr. Elvins did not have actual control of the firm. That argument is misplaced. BLM was not required to establish with complete certainty the existence of an actual impropriety. See generally NKF Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638; NES Gov't Servs., Inc.; Urgent Care, Inc., B-242358 et al., Oct. 4, 1991, 91-2 CPD ¶ 291 (an agency properly may exclude an offeror from the competition where it reasonably concludes, on the basis of factual evidence, that there is a likelihood of an actual conflict of interest). It was sufficient that the agency had "reason to believe" Mr. Elvins had such control, FAR § 3.603(a)(1), provided there was a factual basis for such a belief. We find that BLM had a reasonable, factual basis for its conclusions.

The record shows that BLM's inquiries, begun in response to the Air Force letter, produced documents indicating that Ms. Holton introduced Mr. Elvins, her husband, to BLM contracting officials as Marc's representative; Mr. Elvins

---

<sup>2</sup>BLM made no such determination in this case.

represented Marc at three prework conferences on October 1-2, 1990, in connection with contract performance; Mr. Elvins had represented Marc at prework conferences in previous years as well, in connection with prior BLM contracts, sometimes signing as "supervisor," other times as "local manager"; Mr. Elvins advised BLM he was the point of contact for the contracts, and for any complaints about contract performance, and told BLM he could be reached at his Nellis Air Force Base telephone number; and Mr. Elvins signed for Marc on the Notices to Proceed for the Red Rock Canyon and Las Vegas contracts. Based on facts such as these, which establish that Mr. Elvins had considerable responsibility for company affairs, so that the firm was likely to be substantially controlled by a government employee, BLM's finding the firm ineligible for an award was reasonable.

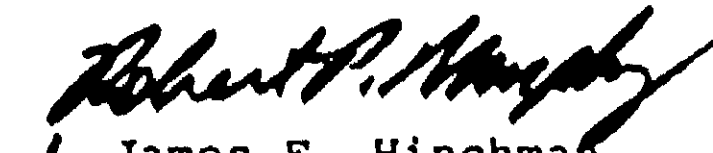
Marc further argues that, although Mr. Elvins was administratively disciplined for violating Air Force conflict of interest regulations, this action was based on unfounded allegations and should have had no bearing on the BLM procurements. We disagree. The investigation and subsequent disciplinary action by the Air Force, at the very least, could be considered by BLM in making a determination under FAR § 3.601. Taking the record as a whole, the Air Force action, together with the pattern of Mr. Elvins' prior dealings with BLM as disclosed in its own investigations, indicated that, to all appearances, Mr. Elvins had a substantial degree of control of the company.

As noted above, Marc argues there can be no conflict because Ms. Holton has divorced Mr. Elvins and Mr. Elvins' employment with the firm has been terminated. An agency's determination as to the presence of an impermissible conflict necessarily must be based on circumstances present at the time award was to be made. Electronics West, Inc., B-209720, July 26, 1983, 83-2 CPD ¶ 127. Marc did not advise BLM (and does not assert now) that the marriage and employment relationships were terminated at that time. That these changes may have occurred subsequently has no bearing on the reasonableness of BLM's contemporaneous determination. See Wildcard Assocs., 68 Comp. Gen. 563 (1989), 89-2 CPD ¶ 74; Big Sky Resource Analysts et al., B-224888; B-224888.2, Jan. 5, 1987, 87-1 CPD ¶ 9 (award date the time for determining whether firm is controlled by government employee).

Also without merit is Marc's argument that there could be no conflict because Mr. Elvins worked for the Air Force, not BLM. The government is generally precluded from contracting with a business controlled or owned by an employee of a government agency, whether or not it is the contracting

agency. Tamara L. Wolf, 68 Comp. Gen. 212 (1989), 89-1 CPD ¶ 99. We therefore find no basis for questioning the reasonableness of BLM's determination in this case.

The protests are denied.

  
for James F. Hinchman  
General Counsel